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NO. 97

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

R. F. BALL CONSTRUCTION COMPANY, INC.
and UNITED PACIFIC INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE-INTERPLEADER R. F. BALL CONSTRUCTION COMPANY, INC.

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COMMERCIAL RECORDER, FORT WORTH, TEXAS— 10-31-57—40

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STATEMENT

The Government, Appellant, takes the position that if it prevails over United Pacific Insurance Company

and establishes a prior right to the fund, this Court should deny to Appellee-Interpleader the $500.00 fee which was ordered paid out of such fund.

The stipulation which the Government, as a party Defendant to the immediate interpleader suit, entered into is as follows:

> "11. This case originated in the State District Court of Bexar County, plaintiff therein filing a suit in the nature of a Bill of Interpleader, and tendering into court the $13,228.55. The allegations of plaintiff's petition with reference to the dispute over such fund and with reference to its inability to make payment thereof without subjecting itself to possible double liability, are true. Plaintiff asks allowance of interpleader fee and its court costs, to be payable out of the $13,228.55. It is stipulated that a reasonable fee for the services performed by Simon & Simon, attorneys for R. F. Ball Construction Co., Inc. (the interpleader) is $500; provided a fee may be allowed by the Court to the interpleader's attorneys out of the $13,228.55 in question, under applicable principles of law." (TR. 4)

ARGUMENT

In support for this position, the Government relies entirely on certain language in *U. S.* vs. *Liverpool and London and Globe Insurance Company*, 248 U. S., 215. Said decision is not applicable to the present case for each and all of the following reasons:

a. *Liverpool* was a garnishment suit and the costs and garnishee fee were adjudged by your Honors in accordance with Texas Rule 677. Texas Rule 677 relating to costs in garnishment cases provides "where the garnishee is discharged upon his answer, the costs of the proceeding including a reasonable compensation to the garnishee, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant and included in the execution provided for in this section;**"

The plaintiff in a garnishment suit assumes the risk of the payment of costs, including the garnishee fee, in the event that he catches no funds or properties in garnishee's hands and the garnishee is discharged. If funds are caught, the defendant (meaning the defendant in the main action) must pay all costs including garnishment costs and garnishee fee. Your Honors, in *Liverpool*, adjudged the costs in accordance with the Texas Garnishment Rule of Procedure. There is no similar statutory provision in Texas for taxing of costs in an interpleader action. In both State and Federal courts, interpleader costs are usually paid out of the fund, pursuant to long-established equitable principles.

The stakeholder has no interest in the fund which he holds, and can neither win nor lose by the court proceeding. Hence, inasmuch as he cannot pay the money to one contesting party without running the hazard of liability to the other, courts have long recog-

nized the interpleader process by which the stakeholder deposits the funds in the registry of the court. If he is a valid interpleader, then his costs and fees are paid out of the impounded fund. It would seem unfair to tax interpleader fees against the loser of the contest over the funds.

If the Government position is sustained, interpleader will be deprived of its costs and fee, unless the same are adjudged against United Pacific. This situation points up the difference between a garnishment action, wherein the initiating plaintiff guarantees garnishee fee in event that he fails to catch funds or property in the hands of the garnishee, and the interpleader action, which is instituted by a stakeholder, who looks to the fund for compensation of fees and costs.

Liverpool was decided under garnishment statutes (Rules) as to costs. The decision is not applicable to interpleader.

b. In *Liverpool*, the Government refused to consent to being joined as an adverse party, and garnishee's complaint against it was dismissed. The Government then intervened in the case in order to preserve its position as a plaintiff. Similarly in *Ford Motor* vs. *Hackert*, *143 F. S. 216*, the Government withheld consent to the interpleader and was dismissed, and then filed intervention asserting that its tax lien was paramount. Also in the Ford Motor case the court held that the plaintiff was not sufficiently disinterested to be deemed a true interpleader. In our

immediate case the Government not only consented to the interpleader suit and remained therein as a defendant, but the Government stipulated that plaintiff's petition with reference to the existence of a dispute and with reference to its possible double liability were true. (Tr. 4). Having elected to seek its recovery through this interpleader suit, the Government cannot avoid usual and normal incidents thereof, which include the deduction of the fee prior to distribution of balance to the winning party.

The situation is not unlike *In Re Boyer, 130 F. S. 20* where the Government sustained its lien in a bankruptcy proceeding, but the court ruled that the fees of the trustee and referee were payable out of the proceeds of sale.

c. As discussed in *U. S.* vs. *Ullman, 115 F. S. 211,* there is no reason why the general rules of interpleader become inapplicable where the Government is one of the contending parties. The Ullman argument is discussed and upheld in a recent case by the St. Louis Court of Appeals, *American Alliance Insurance Company* vs. *Mitchell, 299 S. W. 2d 536.*

Federal Courts have recognized the general principles governing interpleader procedures:

Massachusetts Mutual Life Insurance Co. vs. *Morris,* 61 F. 2d 104;

New York Life Insurance Co. vs. *Miller*, 139 F. 2d 657;

Globe Indemnity Co. vs. *Puget Sound*, 154 F. 2d 248;

Palomas Land & Cattle Co. vs. *Baldwin*, 189 F. 2d, 946.

In our immediate case we have the further situation of the Government stipulating for the payment of the reasonable fee of $500.00 provided that the same may be allowed out of the fund "under applicable principles of law." (Tr. 4).

The Government has suggested no reason why these applicable principles, governing interpleaders generally, should not apply here.

We have found no reference to the Liverpool case in Bruce vs. U. S. cited by the Government, nor can we find any pertinency. In the Boston Insurance case, the Government was invited to intervene. The judgment of the court was based on the Liverpool decision, without any discussion thereof.

CONCLUSION

WHEREFORE, Appellee-Interpleader prays that the decree of the United States Court of Appeals for the Fifth Circuit be affirmed insofar as such decree

approves payment of its interpleader expenses, and for general relief.

Attorney for Appellee-
Interpleader, R. F. Ball
Construction Company, Inc.